Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-959

SAN FRANCISCO-OAKLAND MAILERS UNION No. 18, and
SAN FRANCISCO TYPOGRAPHICAL UNION LOCAL No. 21,
Petitioners,

v.

HARRY JOHNSON,
Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California First Appellate District

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San Francisco-Oakland Mailers Union No. 18 and San Francisco Typographical Union No. 21 jointly petition for the issuance of a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, to review its decision of August 15, 1975, entered against petitioners, which decision became final on October 9, 1975, upon the denial by the Supreme Court of the State of California of a petition for hearing.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, is not published, but is

printed as Appendix "A" to this Petition. There are no other judicial opinions entered in the proceeding below.

JURISDICTION

The decision of the Court of Appeal was entered on August 15, 1975. Petitions for rehearing were filed, and subsequently denied on September 12, 1975. A copy of the order denying said petitions is printed as Appendix "B" to this Petition. On September 24, 1975, petitions were filed for a hearing in the Supreme Court of the State of California. Said petitions were denied on October 9, 1975. A copy of the notification of such denial from the Clerk of the Supreme Court of the State of California is printed as Appendix "C" to this Petition. This Court has jurisdiction of the present petition under 28 U.S.C. Sections 1257(3) and 2101(c).

QUESTIONS PRESENTED

1. Whether national labor policy, reflected in the provisions of the National Labor Relations Act, as amended, (29 U.S.C. Sections 141 *et seq*), and the Labor-Management Reporting and Disclosure Act (29 U.S.C. Section 401 *et seq.*), requires application of the rules of agency contained in Section 6 of the Norris-LaGuardia Act (29 U.S.C. Section 106) in state tort actions brought against labor unions, so as to preclude common law state rules of vicarious liability as a basis for finding unions responsible for the conduct of putative agents.

2. Whether federal pre-emptive legislation in the field of labor management relations forbids a finding by a state court that a labor union has ratified the tortious conduct of an individual where such finding rests upon the exercise by union members of their Constitutional and statutory rights to contribute to a fund for the legal defense of the

individual charged with illegal activity, and their re-election of him to union office.[1]

STATUTORY PROVISIONS INVOLVED

The principal statutory provision involved in this case is Section 6 of the Norris-LaGuardia Act (29 U.S.C. Section 106), which reads as follows:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or a ratification of such acts after actual knowledge thereof."

STATEMENT OF THE CASE

1. Summary of the Facts

The events upon which the judgment below was entered arise out of a labor dispute between respondent, then a publisher of a group of weekly newspapers, and the two petitioning unions. Each of the unions was seeking a satisfactory labor agreement with respondent, and picketing began when these efforts failed. Respondent attempted to avoid the impact of the picketing by removing the mechanical work on the newspapers to a new location, and continuing operations with persons whom the court below describes in its opinion as "volunteers," some "ten or fifteen of [whom] were teenagers" (App. "A", p. 5).

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1. The questions presented were raised by petitioners in their respective briefs to the Court of Appeal by express reference to the Norris-LaGuardia Act and to decisions of this Court applying the agency standards in that statute. In their petitions for rehearing to the Court of Appeal, and in their petitions for a hearing by the California Supreme Court, petitioners dealt extensively with the questions presented in the instant Petition.

Pickets were established at the new work location, most of whom were members of petitioner Local 18, and some of whom were members of petitioner Local 21. Douglas Smith, president of Local 18, was present, and according to the court below "was in charge of all the pickets" (App. "A", p. 5).

During the course of the picketing, an incendiary bomb was thrown into the building where respondent and his "volunteers" were working. In connection with the event, Douglas Smith, president of petitioner Local 18, was subsequently arrested and convicted of unlawfully entering respondent's land with an intent to injure property. Smith paid a $500 fine and served a six month jail sentence, during most of which period he was placed on a work furlough program and continued to act as president of Local 18. While serving his sentence, Smith was re-elected as president of his union.

Picketing continued thereafter, and the dispute remained in effect for a number of months. Douglas Smith appeared occasionally at the picket line, and took charge of the picketing whenever he was there. Members of both petitioning unions participated in the picketing.

Prior to Smith's conviction, a number of members of both unions, including officers, organized and contributed to a defense fund which was used to pay Smith's legal expenses in the criminal proceeding. Smith's fine in the criminal action was paid from this fund.

There is no evidence of further disorder in connection with the picketing which continued. There is evidence, however, of subsequent threats made away from the picket line by an individual named George Hogan, an organizer for petitioner Local 21 who died prior to the trial. Thus, there was testimony that on one occasion Hogan told respondent

that a business operation which he owned in a different city would be blown up if the instant lawsuit was not dropped, and that Hogan on another occasion had made a threat against respondent to the latter's wife based on the continued prosecution of the lawsuit.

At the conclusion of the trial the jury awarded a verdict of $10,000 against all defendants; punitive damages in the amount of $25,000 against petitioner Local 18; punitive damages in the amount of $135,000 against petitioner Local 21; and punitive damages in the amount of $250 against Smith.[2]

2. The Decision of the Court of Appeal

On Appeal the court below sustained the judgment against petitioners, concluding that "Smith was acting within the scope of his authority as an agent of both unions when he threw the bomb" (App. "A", p. 17). There was no finding, and no contention during the trial, that either of the petitioners had authorized the act of throwing the incendiary device into respondent's building.

The court below also found that petitioners had ratified the bomb throwing incident, thereby subjecting them to punitive damages. The evidence relied on by the court below in support of this conclusion is that both unions had encouraged contributions to Smith's defense fund; that the membership of Local 18 had re-elected Smith as their president; that Smith remained "in charge of the picket line" (App. "A", p. 13); that Local 21 did not officially "express its disapproval" of Smith's conduct after he was convicted; and that Local 21's organizer had made threats to compel the withdrawal of the instant lawsuit (App. "A", p. 16).

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2. Smith, in addition to the petitioning unions, was a defendant in the case below. He did not appeal from the verdict.

REASONS FOR GRANTING THE PETITION

1. The court below has found petitioners responsible in money damages for the actions of Douglas Smith because, initially, at the time of the bomb-throwing incident Smith was acting within the scope of his agency on behalf of each local union. There is no finding, and there was no contention by respondent, that either local union authorized Smith to throw the incendiary device. Accordingly, the threshold finding of agency is premised upon the court's application of a common law rule of vicarious responsibility of a principal for acts, although not authorized, nevertheless fall "within the scope" of an agent's employment.

Whatever validity this conclusion may have under the common law of California, it is at odds with the standards established by Section 6 of the Norris-LaGuardia Act. That provision reflects a clear Congressional intent to abandon the various doctrines of vicarious liability which have evolved under the laws of the several states, and to substitute in their place a single federal rule which conditions a finding of agency upon "clear proof of an actual participation in, or actual authorization of" the acts of an individual officer or member. *Brotherhood of Carpenters v. United States,* 330 U.S. 395, 403 (1937); *Ramsey v. UMW,* 401 U.S. 302, 309-310 (1971). The first question presented in this petition is whether state courts are required to follow the federal rule, reflected in Section 6 of Norris-LaGuardia, in view of the established principles of federal pre-emption in the broad area of the regulation of labor-management relations.

This is an important and recurring question which should be resolved by this Court. Charges that labor organizations are answerable in damages for personal and property damage inflicted by individuals are presently adjudicated in

both state and federal courts. State courts have traditional tort jurisdiction over such cases (*Automobile Workers v. Russell,* 356 U.S. 634 (1958), and the federal district courts hear and determine issues of this kind under the doctrine of pendent jurisdiction (*United Mine Workers v. Gibbs,* 383 U.S. 715 (1938)). As shown in *Gibbs, supra,* the limitations of Section 6 would preclude a finding in the present case that either of the petitioners had participated in or authorized the act of Smith which caused respondent's property damage. See also, *Ramsey v. UMW,* 401 U.S. 302 (1971); *United States v. White,* 322 U.S. 694 (1944).

Tort actions against labor organizations for improper conduct during labor disputes constitute an extremely serious threat to the financial survival of labor organizations, particularly small unions. Awards of punitive damages in cases such as the present may well outrun by far the ability of the organization to respond. The record in this case shows that Local 18 had a net worth of $9,000.00 at the time of trial. The punitive damage award against it was for $25,000.00. The size of this award, which undermines the stability of the organization and thereby the stability of the collective bargaining relationships for which it is responsible, is attributable to the application of local rules of agency which are inconsistent with the federal rule. This kind of result is antithetical to national labor policy, and its legitimacy should be reviewed and determined by this Court both for this case and all cases of a similar nature.

2. The prerequisites for a finding of agency which are embodied in Section 6 of the Norris-LaGuardia Act should be made generally applicable in state and federal courts alike in order to assure uniformity in national labor policy. Federal policy in this field is to be ascertained in the com-

plex of laws by which Congress has exercised its comprehensive authority. The Norris-LaGuardia Act is one of these enactments. *Brotherhood of Carpenters v. United States,* 330 U.S. 395 (1937). Section 6 is an integral part of this regulation, whether it is "called a rule of evidence or one that changes the substance of law and agency." *Brotherhood of Carpenters v. United States, supra,* at p. 403.

The exclusivity of federal law in the field of labor management disputes, which is settled doctrine in cases involving unfair labor practices and protected activity (*Transit Union v. Lockridge,* 403 U.S. 274 (1971)), is applicable as a matter of principle wherever it is necessary to assure "that recognition of legitimate state interest does not interfere with effective administration of national labor policy." *Linn v. United Plant Guard Workers,* 383 U.S. 53 (1966). Thus, state courts have been curtailed in applying local rules of defamation where the challenged utterance occurs in the context of a labor dispute. *Linn v. United Plant Guard Workers supra; National Association of Letter Carriers v. Austin,* 418 U.S. 274 (1974). In such cases, this Court has made clear that the patchquilt of decisional law of the various states is replaced by a uniform rule which is compatible with federal labor policy. Similarly, in other areas of labor law where states and federal courts exercise concurrent jurisdiction a uniform body of substantive law applies to both judicial systems in order to protect the integrity of federal policy within the area where Congress has asserted a comprehensive oversight. *Lucas Flour Company v. Teamsters Local 174,* 369 U.S. 95 (1962).

In failing to recognize and apply these principles, the court below erred, and its decision should be reversed.

3. The conclusion of the court below that petitioners ratified the conduct of Smith, in consequence of which punitive damages were awarded, stands on no firmer footing under federal labor policy than its finding that Smith was acting within the scope of an agency relationship with petitioners. The court's conclusion is premised upon the contributions made by members and officers of each union to Smith's defense fund; the re-election of Smith as president of Local 18; the failure of either union to take disapproving action against Smith following his conviction; and threats made by one of Local 21's organizers. None of these considerations could properly be treated as evidence of ratification under federal standards.

The Smith defense fund was established privately by individuals who believed that Smith should have legal representation to meet the charges against him; neither union contributed to the fund. The right of individuals to associate for the purpose of providing or selecting attorneys to secure an individual's rights is protected by the First Amendment to the United States Constitution. *United Transportation Union v. State Bar of Michigan,* 401 U.S. 576 (1971); *NAACP v. Button,* 371 U.S. 415 (1963); *Brotherhood of Trainmen v. Virginia,* 377 U.S. 1 (1964); *United Mine Workers v. Illinois Bar Association,* 389 U.S. 217 (1967). In like vein the right of union members to nominate and elect officers of their choice is protected by the Labor-Management Reporting and Disclosure Act, 29 U.S.C. Sections 481-483. Federal law makes clear that Smith was not disqualified from seeking office because of his conviction. See 29 U.S.C. Section 504. The officers and those responsible for administration of a labor union are required to be even-handed in the use of union facilities and membership lists in connection with election campaigns. See generally, *Wirtz v. Glass Bottle Blowers Association,* 387 U.S. 453 (1968). Reliance upon the exercise by individual union members of legally protected rights cannot be made the occasion for a

finding of ratification by their union of the acts of the individual whom the members support without destruction of the rights themselves. The court below considered this fundamental proposition inapposite on the same ground that it has found petitioners to be responsible for acts committed within the scope of Smith's agency, namely, that state courts are free to ignore principles of federal law in this case.

Similarly, the failure of petitioners to take disapproving action against Smith following his conviction, and the threats made by a deceased organizer for Local 21 are also without probative force to establish ratification under Section 6 of the Norris-LaGuardia Act. Under that provision there is no obligation on the part of a labor union to disavow an untoward act of a putative agent in order to escape a determination of ratification. On the contrary, ratification cannot be established in the absence of affirmative approval or adoption with full knowledge of the acts which are being ratified. As stated in *United Mine Workers v. Gibbs,* 383 U.S. 715, 739 (1966):

> "There can be no rigid requirement that a union affirmatively disavow such unlawful acts as may previously have occurred . . ."

There is an absence of any evidence in the present case that either of the petitioners approved the acts in question. The most that is reflected is a concern by the various members and officers of petitioners that Smith was unjustly accused and that he be afforded legal representation in his defense. Similarly, there is no evidence indicating that either Union was at any time, prior to discovery in this case, aware of the accusations made against Hogan, much less that either Union ratified the alleged threats attributed to him.

In sum, the determination that petitioners ratified the bomb-throwing incident rests upon evidence which has no probative force under Section 6 of the Norris-LaGuardia Act. If federal policy in this area of labor-management disputes is to be respected in the present case, the decision below cannot stand.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that a Writ of Certiorari should issue to the Court of Appeal of the State of California, First Appellate District, to review the judgment herein.

Dated: December 16, 1975.

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Appendix "A"

In the Court of Appeal of the State of California
First Appellate District
Division Two

F I L E D
AUG 15 1975
Court of Appeal—
First App Dist

By .....
DEPUTY

1 Civ. No. 32967
(Sup.Ct.No. 626585)

HARRY JOHNSON,
Plaintiff and Respondent,

v.

SAN FRANCISCO-OAKLAND MAILERS UNION, LOCAL No. 18, et. al.,
Defendants and Appellants.

Plaintiff Harry Johnson[1] brought suit against defendants Douglas Smith, San Francisco-Oakland Mailers Union, Local 18 (hereinafter "Local 18") and San Francisco Typographical Union, Local 21 (hereinafter "Local 21") to

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1. Calculated Security Investment Corporation was originally named as a coplaintiff in the action. However, at the commencement of the trial, the court granted a motion to amend the complaint so as to dismiss this corporation as a plaintiff and substitute Harry Johnson in its place and stead.

recover damages allegedly sustained when defendants hurled an incendiary bomb into certain premises owned by plaintiff. Plaintiff sought to recover punitive as well as compensatory damages, alleging that defendants had acted willfully, oppressively and with malice.

Defendants, by way of answer, denied the charging allegations of the complaint.

The evidence produced at the trial may be summarized as follows: In September 1965, plaintiff Harry Johnson acquired the ownership interest and publication rights in a group of weekly newspapers in Marin County collectively referred to as "The Marin Guide." He also acquired an option to purchase the plant and equipment located on Caledonia Street in Sausalito, California. At the time of plaintiff's acquisition of the publishing rights, the Sausalito plant was closed and the newspapers were being printed in San Francisco by a subcontractor. However, plaintiff planned on reopening the Sausalito plant and having the composing room work done by the employees who had previously worked at that plant. With this end in mind, he contacted the employees who had previously worked at the plant, all of whom were members of Local 21. He also spoke with Russell Wagle, the president of Local 21, who agreed that it would be feasible for the Local 21 members to return to work and print the paper on a flat per page price to plaintiff. Plaintiff made it clear to Mr. Wagle that he did not intend to have the mailing work, as opposed to the composing room work, done at the Sausalito plant. Plaintiff's reason for not wishing to rehire members of the mailers union, Local 18, was that the books of the newspaper showed that the mailing costs had been exorbitant. Plaintiff planned to have the mailing done by a union-controlled mailing house in San Francisco.

Plaintiff reopened the Sausalito plant in early October 1965. Although plaintiff had not intended to have the mailing done at the plant, Mr. Wagle suggested that he contact Douglas Smith, the president of Local 18, to see if something could be worked out. Plaintiff informed Smith that there would have to be a reduction in the size of the mailing force and that he did not want to rehire any of the mailers who had previously worked at the plant. Smith then offered to furnish plaintiff with a crew of six new men who would do the work in one shift, and plaintiff agreed to this proposal. However, when the Local 18 mailers reported for work, they were 10 or 15 in number, rather than six. Plaintiff complained to the Local 18 supervisor, Bill Rhodes, and Rhodes agreed that the work could be done by six men and two supervisors. However, some 30 minutes after the work force of eight went on duty, one of the mailers stuck a screwdriver in the mailing machine and rendered it inoperable. The eight mailers then left the plant and went to a bar across the street.

During the next printing of the paper, on approximately October 19, 1965, eight mailers reported for duty but the mailing machine again broke down and the mailers left the plant. Plaintiff then advised Mr. Wagle that he had definitely decided to subcontract the mailing work to a professional mailing house.

On the afternoon of October 25, 1965, Mr. Wagle, by telephone, instructed the members of Local 21 at the Sausalito plant to quit work and leave the plant. Plaintiff testified that he asked the Local 21 members why they were leaving, and they replied that Mr. Wagle had ordered them off the job until plaintiff had settled his differences with Local 18. Mr. Wagle himself testified that he had two reasons for ordering his men off the job: he was concerned about the

unfair way in which the members of Local 18 were being treated and he was also concerned about the fact that plaintiff had not yet signed a contract with Local 21. Mr. Wagle and Mr. Smith were both present in San Mateo at a labor conference on the afternoon of October 25 and Mr. Wagle told Mr. Smith that plaintiff was not going to use the mailers at the plant. Mr. Smith then left San Mateo and drove to the Sausalito plant. A picket line was set up at the plant that evening with members of both Locals 18 and 21 participating.

After the picketing had commenced on October 25, plaintiff made arrangements to have the newspaper printed at another plant. He then prepared mats and attempted to take them to the plant where they were to be printed. Upon leaving the plant, plaintiff was surrounded by a mob of pickets who beat him, took the mats from him and tore them up. Plaintiff identified Smith and Rhodes of Local 18 and George Hogan of Local 21 as part of the mob which attacked him. Hogan was an organizer and elected official of Local 21, and Wagle had appointed him as his personal representative at the scene of the picketing at the Sausalito plant.

Following the loss of the first set of mats, plaintiff returned to the Sausalito plant and new mats were made. Plaintiff then left through the back of the building with the mats in his hand and went over a fence to meet his wife, who had arranged to transport him and the mats to a printing plant in Walnut Creek. Plaintiff rushed into his wife's car and she immediately locked the door. He was followed by eight or nine pickets who attempted to pry the door open and pounded the car and rocked it. On the way to Walnut Creek, the Johnsons' car was followed by another car which attempted to nudge it off the road.

Plaintiff succeeded in having the newspaper printed in Walnut Creek, and on October 26, 1965, he took the paper to a building owned by him and located in Mill Valley. Some 30 volunteers had gathered at the Mill Valley building to perform the mailing work. Ten or fifteen of the volunteers were teenagers. The pickets discovered that the mailing work was being done at the Mill Valley location and they set up a picket line of approximately 80 persons. The picket line was set up by Smith, the president of Local 18; Duane Jones, an officer of Local 18; and John DeMartini, an executive board member of Local 21. Smith was in charge of all the pickets in the line. In the absence of Smith, Bill Rhodes of Local 18 was in charge of the picket line. Wagle and Hogan recruited members of Local 21 to assist in the picketing on the night of October 26. Hogan was also present and participated in the picket line.

At approximately midnight on October 26, plaintiff and several teenagers were packaging newspapers when plaintiff observed Smith peeking into the room. Plaintiff testified that Smith was wearing the clothing which he had been wearing all that evening. This consisted of a grey tweed topcoat and a grey felt hat. When plaintiff looked up and saw Smith, the latter immediately backed out of the room. Immediately thereafter, a bomb was hurled into the room. Plaintiff testified that he could not positively identify the individual who hurled the bomb, but he did see the individual's hat and the sleeve of his coat. Both appeared to be identical to those worn by Smith. Plaintiff described the bomb as a typical grenade-type bomb with something attached to it. The bomb struck the wall, and within a matter of seconds the room was engulfed in flames. Plaintiff and the other occupants of the room exited to an adjacent breeze-way. As plaintiff was fleeing from the building, one

of the teenage boys who had been helping with the mailing pointed at Smith and yelled, "Mr. Johnson, that's the man that threw the bomb. Grab him." Plaintiff did grab Smith, but he was then hit from behind and forced to release Smith, who returned to the picket line.

Smith was subsequently tried and convicted of willfully and unlawfully entering land belonging to the plaintiff for the purpose of injuring the property rights of the owner. Smith was sentenced to six months in jail and fined $500. Smith testified in the instant action that he had not thrown the bomb and that he believed it had been thrown by an individual named "Suitcase" Jones. Smith admitted that his suspicions had focused on "Suitcase" Jones at the time of his trial on the criminal charge, but that he had not mentioned the suspicions to his defense attorney nor had he testified concerning them at that trial.

"Suitcase" Jones testified at the trial of the instant action and stated that he had entered the building and had thrown the bomb. Jones testified that he had entered plaintiff's Mill Valley building through a particular rear door. However, the fire chief, who had arrived at the scene soon after the fire began, had found that the door through which Jones had allegedly entered was locked. Jones denied that anyone else was with him when he threw the bomb, although "possibly there may have been people outside." However, another witness called by the defense, Henry Holl, a member of Local 18, testified that he was right behind Jones when he threw the bomb. It was also established that Jones had admitted in a deposition that he had agreed to testify to the throwing of the bomb only after having been assured that the statute of limitations had run on an arson prosecution against him.

When the police arrived at the scene following the throwing of the bomb, plaintiff placed Smith under citizen's arrest and he was taken into custody. On the following day, plaintiff received a telephone call from George Hogan, the organizer for Local 21. Hogan advised the plaintiff that if he did not drop his charges against Smith, plaintiff would never make it alive to the district attorney's office.

The minutes of the executive committee of Local 18 show that at a meeting held on October 30, 1965, the committee unanimously voted to concur in the actions of the officers in the Marin Guide lockout. At a second executive committee meeting, held on February 20, 1966, Smith advised the committee that he had been sentenced to six months in jail and fined $500, and that the judge had declared him guilty and had imposed the maximum sentence. Smith asked for voluntary contributions to help finance his appeal. Smith spent 30 days in jail and then went on a work furlough program for the remaining five months. During that time he continued to operate as president of Local 18. In May 1966, while Smith was still serving his sentence, he was reelected president of Local 18.

Picketing continued following the bomb throwing incident, and Smith continued to frequent the picket line for some two years subsequent to the bombing. Whenever Smith was present at the picket line, he was in charge of all the pickets, including whatever members of Local 21 were present. Although there was an administrative procedure within Local 18 whereby any member of the union could have brought charges against another union member who had thrown a bomb, no charges were ever instituted against Smith. At no time during the period following the bomb-throwing incident was Smith ever advised by any

officer of Local 21 that there was an objection to his being in charge of their members when they were on the picket line.

Prior to Smith's criminal trial in January 1966, Wagle, the president of Local 21, along with others, set up the Douglas Smith Defense Fund and solicited contributions. Wagle's name was on the letterhead of the letter requesting contributions, as was that of Greg Bachich, the secretary of Local 21. Also, Wagle personally contributed to the Douglas Smith Defense Fund. Local 21 passed a resolution approving the setting up of the Douglas Smith Defense Fund. Smith's $500 fine was paid out of this fund.

Approximately eight months after the fire bombing incident, plaintiff was attempting to print his paper at a plant in San Jose. Mr. Hogan, an officer of Local 21, visited plaintiff at the San Jose plant and advised him that "they" would blow up that plant if plaintiff did not drop his lawsuit against the unions and Mr. Smith. Hogan also threw an electrical switch which controlled a large tubular press at the San Jose plant at a time when two of plaintiff's employees were inside the press.

Eleanor Johnson, plaintiff's wife, was approached by George Hogan and three other men shortly prior to Christmas 1967, in front of a department store in Mill Valley. Hogan informed Mrs. Johnson, "If you don't tell your husband to drop this lawsuit with Smith, you will find him boxed up." Hogan also told Mrs. Johnson that "your children are walking [or] healthy now."

At the conclusion of the trial, the jury returned a verdict awarding plaintiff compensatory damages in the amount of $10,100 against all three defendants. The jury also awarded plaintiff punitive damages in the amount of $25,000 against Local 18, $135,000 against Local 21, and

$250 against Smith. Local 18 and Local 21 each filed timely notices of appeal from the judgment on verdict.[2]

Each of the appealing unions contends that there is no evidentiary support for the jury's award of either compensatory or punitive damages against them. They concede, at the outset, that although the evidence was conflicting on this point, the jury must have found that it was Smith, and not "Suitcase" Jones, who threw the incendiary bomb. However, appellants take the position that they were not legally responsible for Smith's act of throwing the bomb because there was no evidence to support a finding that they ever authorized or ratified such conduct on his part.

Local 18 contends that, although it conceded at the trial that Smith was its agent at all pertinent times, the crucial question was whether Smith's act of throwing the incendiary bomb was committed within the course and scope of such agency. It asserts that, as a matter of law, it was not, since a principal cannot reasonably anticipate that his agent will commit serious crimes in the furtherance of the principal's interest unless the principal knew that the agent had engaged in such conduct in the past. Local 18 asserts that there was no evidence that Smith had ever thrown a bomb or engaged in any sort of violent behavior prior to the night of October 26, 1965. It follows, according to appellant, that it could not reasonably have anticipated such an act on his part and that such act was, as a matter of law, beyond the scope of Smith's agency.

The sole authority upon which appellant relies in support of its position is Comment a, section 231, Restatement

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2. Local 21 also purports to appeal from the denial of its motion for new trial and judgment notwithstanding the verdict, which order is nonappealable.

Second of Agency, which provides in part as follows: "The fact that the servant intends a crime, especially if the crime is of some magnitude, is considered in determining whether or not the act is within the employment, since the master is not responsible for acts which are clearly inappropriate to or unforeseeable in the accomplishment of the authorized result. The master can reasonably anticipate that servants may commit minor crimes in the prosecution of the business, but serious crimes are not only unexpectable but in general are in nature different from what servants in a lawful occupation are expected to do." (Pp. 512-513.)

In an attempt to bring itself within the purview of this language, Local 18 contends that the throwing of the incendiary bomb was "tantamount to arson," that "arson has consistently been regarded as a most serious and despicable crime," and that "California penal laws place arson in the same category as robbery or burglary." Appellant argues, therefore, that Smith's conduct was unquestionably beyond the scope of his agency.

Assuming that the Restatement comment upon which appellant relies is in accord with California law, it is apparent, nevertheless, that it relieves a principal of responsibility for only the serious crimes of his agent and not for relatively minor crimes. Appellant has demonstrated its awareness of this rule by talking in terms of "arson," but the fact remains that Smith was convicted only of the misdemeanor offense of unlawfully entering the land of another for the purpose of injuring the property rights of the owner. Further, the evidence falls short of establishing that when Smith threw the incendiary bomb, he entertained an intent to burn down plaintiff's building or seriously injure the occupants therein. Although the bomb did ignite a pile of newspapers in the room, all of the occupants of the

room escaped without injury, except that plaintiff testified that his eyes were irritated by the smoke. When the building was subsequently repaired, plaintiff made a claim against his insurance company in an amount less than $5,000. The fair import of the evidence is that Smith entertained the intent of severely frightening plaintiff and the other occupants of the room and thereby dissuading them from putting out the newspaper without the aid of Locals 18 and 21. However, his intent to create serious damage to either persons or property may well be doubted.

In *Caldwell v. Farley* (1955) 134 Cal.App.2d 84, the defendant labor union was held liable for its agent's conduct in striking the member of another union in the head with a 1″ by 4″ board and seriously injuring him after the latter had expressed the view that defendant union should not go on strike.

It appears that the conduct in the *Caldwell* case was no less serious than the conduct in the instant case. We find that there is no merit to Local 18's claim that Smith's conduct was beyond the scope of his agency.[3]

Similarly, we find lacking in merit Local 18's claim that there was insufficient evidence to support a finding that it ratified Smith's conduct in throwing the incendiary bomb. Local 18 argues that the only evidence upon which the jury could have based a finding of ratification consisted of certain testimony that plaintiff and his wife had received anonymous threatening telephone calls following

3. It should be noted that Local 18 makes no claim, as did the union in the *Caldwell* case, that Smith's conduct in throwing the incendiary bomb was beyond the scope of his employment because it was motivated by his own personal interests rather than those of the union. Any such claim would have been unavailing, since it is apparent that Smith was motivated solely by his desire to further union interests. The record is devoid of any evidence of personal animosity between Smith and plaintiff.

the bomb throwing incident, and the evidence that members of Local 18 had contributed to the Douglas Smith Defense Fund. Appellant contends that none of this evidence should have been admitted because there was no evidentiary basis for connecting the anonymous calls to Local 18 and because contributions to the defense fund were presumably made by union members who believed in Smith's innocence and were merely attempting to ensure that he was adequately represented at his criminal trial.

It is settled that a principal may ratify the wrongful conduct of his agent by failing to discharge the agent after the principal becomes aware of the wrongful conduct. (*Holland v. Nelson* (1970) 5 Cal.App.3d 308, 314.) In *Caldwell v. Farley, supra*, at page 90, the court found support for a finding of ratification in the fact that the union failed to discharge Farley from his position as union steward after it learned that he had assaulted the member of another union. Likewise, in *Coats v. Construction & Gen. Laborers Local No. 185* (1971) 15 Cal.App. 3d 908, 914, it was held that the union had ratified an assault committed by two assistant business representatives of the union by retaining them after learning of their wrongful conduct.

In the instant case, appellant Local 18 has taken the position that its conduct in retaining Smith as its president and the conduct of its members in contributing to his defense fund do not support a finding of ratification because appellant and its members both believed that Smith was innocent. This argument is simply not supported by the record. It is clear that Local 18 and its members were aware at all relevant times that an incendiary bomb had been thrown into plaintiff's building and that such act was wrongful and unlawful. It was also known to all concerned

that Smith had been charged with the offense and was being criminally prosecuted. Local 18's sole attempt to avoid the effect of this evidence is to assert that it and its members all believed that "Suitcase" Jones, and not Smith, had thrown the bomb. However, any such belief would have to have been of extremely recent origin, since Jones was never alluded to during the course of Smith's criminal trial and in fact agreed to testify in the instant action only after being assured that he was immune from prosecution. Thus, long prior to Jones' appearance in the scenario, Local 18 had voted to concur in Smith's actions on the night of October 26, 1965, and had elected to retain him as its president and to leave him in charge of the picket line; and the union members had contributed to his defense fund. Further, after Smith had been convicted of the criminal charge (during a trial in which there was no mention whatever of "Suitcase" Jones), Smith was reelected president of Local 18, there were further contributions to his defense fund and his $500 fine was paid out of said fund.

In the face of this evidence, it is difficult to see how any reasonable jury could have come to any other conclusion but that Local 18 had ratified Smith's act of throwing the incendiary bomb. The evidence of anonymous telephone calls, if improperly admitted, could not have contributed materially to the verdict, since, as Local 18 itself concedes, there was no testimony as to the nature or content of these calls. Further, the independent evidence of ratification by Local 18 was overwhelming.

Local 21 claims that there was no evidence that Smith was acting as its agent when he threw the incendiary bomb or that it subsequently ratified this conduct on his part. It takes the position that Smith was acting solely as the agent of Local 18 on the night of Otcober 26, 1965. Local 21 con-

tends that the two unions were involved in completely separate and independent disputes with plaintiff and that Local 21's sole concern was with plaintiff's refusal to sign a written contract governing the terms of employment for its members. Local 21 argues that although its members engaged in picketing on the night of October 26, they were not picketing in support of any grievance of Local 18, were pursuing their own separate complaint against plaintiff, and were therefore not responsible for the act of Local 18's president, Smith.

In support of this argument, Local 21 relies primarily upon *Mine Workers v. Gibbs* (1966) 383 U.S. 715, where it was held that there was a lack of "clear proof" that an international union had authorized or ratified the violent conduct of one of its local unions. However, the facts of that case are so totally dissimilar from those in the case at bar that it could fairly be said of the *Gibbs* case that there was *no* proof of authorization or ratification by the international union. Stated as concisely as possible, the facts in *Gibbs* were that the representative of the international union was absent from the area before the series of events culminating in the violence by the local union and that immediately upon learning of the violence, he returned to the scene, assumed control of the strike and suppressed the violence.

In the instant case, unlike *Gibbs,* the record is replete with evidence that Local 21 had authorized Smith to act as its own agent on the night of October 26. Contrary to Local 21's claim that it was merely pursuing its own independent interests on that night, the record shows that plaintiff's refusal to employ the members of Local 18 constituted the primary, if not the sole, motivation for the participation of both unions in the formation of the picket line. Although

he may not have signed a written contract to employ the members of Local 21, it is clear that on October 26, plaintiff had never indicated an intent not to use them and had made it known only that he did not want to have the mailing work done by the members of Local 18. When Wagle, the president of Local 21, learned of plaintiff's decision not to use the members of Local 18, he promptly advised Smith and he immediately instructed the members of Local 21 to cease work. Wagle himself admitted that he had two concerns at the time and that one of them was plaintiff's refusal to use the members of Local 18. The jury would certainly have been justified in finding that this was in fact Wagle's *only* concern, particularly in view of plaintiff's testimony that when the Local 21 members quit work, they told him that Wagle had ordered them off the job until plaintiff settled his differences with Local 18. Although the picket line was initially formed by Smith, another officer of Local 18 and an executive board member of Local 18, Wagle and Hogan of Local 21 both recruited members of Local 21 to participate in the picketing and they themselves participated. It was understood by all concerned that Smith was in complete charge of the pickets, regardless of whether they were members of Local 18 or Local 21. When violence began to occur at the Sausalito plant and plaintiff was beaten and his mats destroyed, Hogan, Local 21's organizer, was part of the mob which fell upon plaintiff.

It is apparent from a reading of Local 21's brief that its argument relative to the question of agency stands or falls upon its repeated assertion that Local 21's participation in the picketing was, as a matter of law, motivated solely by its own separate interests and not by any desire to further the interests of Local 18. The evidence simply does not support such contention. Instead, we conclude that the evidence

furnishes more ample support for a finding that Smith was, at all relevant times, acting as the agent of both unions who were jointly attempting to induce plaintiff to reemploy the members of Local 18.

Local 21's argument on the issue of ratification parallels that of Local 18's in one respect, in that Local 21 contends that organizing and contributing to the Douglas Smith Defense Fund suggests nothing beyond a reasonable belief in Smith's innocence. It suffices to state that this argument is no more persuasive when advanced by Local 21 than by Local 18.

Local 21's independent basis for challenging a finding of ratification is essentially that it was in no position to impose any sort of discipline upon Smith, since he was neither an officer nor member of that local. The difficulty with this argument is twofold: first, Local 21 was at liberty to disassociate itself from Smith following the bomb-throwing incident and to express its disapproval of his conduct; and secondly, Local 21 could have refrained from actively supporting Smith, thereby expressing approval of his wrongful conduct and continuing to recognize his leadership on the picket line. The evidence shows that Local 21 chose no such course of conduct. Instead, Wagle and another officer of Local 21 actively participated in the formation of the Douglas Smith Defense Fund, to which members of Local 21 contributed. Local 21 passed a resolution approving the formation of the defense fund. Hogan, the organizer for Local 21, went even farther in his support of Smith, threatening violence unless the charges against Smith were dropped and, at the risk of injuring or killing the employees within the area, turned off a press at the San Jose plant where plaintiff was working. The members of Local 21

continued to recognize Smith's authority over the joint picket line.

The evidence, viewed as a whole, fails to disclose any indication of an attempt by Local 21 to disassociate itself from Smith following the bomb-throwing incident. On the other hand, the evidence does contain ample indications of Local 21's unqualified approval of his conduct. It follows that there is no merit to Local 21's claim that the evidence was insufficient to support a finding of ratification.

In view of our conclusion that there was ample evidentiary support for findings that Smith was acting within the scope of his authority as an agent of both unions when he threw the bomb and that both unions, in any event, subsequently ratified this conduct on his part, an award of both compensatory and punitive damages was proper. Neither union makes any claim to the contrary, and both in fact concede that a principal is liable for both compensatory and punitive damages if he ratifies the malicious act of his agent with full knowledge of the facts. (See *Coats v. Construction & Gen. Laborers Local No. 185, supra*, at pp. 915-916; *Deevy v. Tassi* (1942) 21 Cal.2d 109, 125.)

Each of the appealing unions next contends that even if the jury was entitled to award punitive damages against each of them, the awards in this instance were excessive as a matter of law. Local 18 contends that the $25,000 in punitive damages assessed against it constituted nearly three times its total net worth, since the evidence showed that its net assets consisted solely of $1,447.15 in its checking account and $7,112.44 in two savings accounts. Local 21 contends that the $135,000 award against it cannot be justified upon the ground that Local 21 was five times more guilty than Local 18, therefore said award must have been based upon the fact that its assets were substantially greater than

those of Local 18. However, Local 21 asserts that the award was nevertheless excessive because it represented more than 40 percent of its entire treasury. Local 21 asserts that it has found no appellate court decision upholding a punitive damages award representing so great a portion of defendant's assets.

Plaintiff, in reply to these arguments, denies that the evidence established that Local 18's net assets amounted to only $9,000. Plaintiff points out that Local 18's net assets had averaged in excess of $42,000 for the years 1966 and 1971, and that Local 18's president, Mr. Banks, was unable to explain precisely why the union's bank accounts had suddenly decreased in the amount of approximately $40,000 at the time of trial. In any event, plaintiff denies that there is any merit to Local 18's contention that only net assets can be considered in determining the amount of punitive damages to be assessed. Plaintiff directs our attention to *Wetherbee v. United Ins. Co. of America* (1971) 18 Cal.App.3d 266, wherein this court held that, in determining the amount of punitive damages to be awarded, the jury was entitled to consider the defendant's gross assets and its income as well as its net assets. Plaintiff points out that the evidence produced at the trial showed that Local 18 had gross receipts ranging from approximately $245,000 in 1967 to $316,000 in 1971. Plaintiff contends that when these figures are taken into consideration, the punitive damages assessed against Local 18 were less than 10 percent of its yearly gross receipts and that such an award cannot be deemed to be excessive.

As for the $135,000 award against Local 21, the evidence established that as of the end of April 1973, Local 21 had net funds on hand in the amount of $305,388.30. Local 21's gross yearly receipts were in excess of $1,768,000. In view

of these facts, the award of punitive damages cannot be held excessive.

One final argument requires discussion. Local 18 contends that the trial court committed reversible error by refusing to give its proffered instructions which distinguished liability for compensatory damages from liability for punitive damages and advised the jury that punitive damages could only be awarded upon a finding of malice, oppression or fraud on the part of the union. An examination of the record discloses that the trial court gave other instructions which fully and adequately covered the subjects embraced within Local 18's proposed instructions.

Local 21's purported appeal from the order denying its motion for new trial and judgment notwithstanding the verdict is dismissed. The judgment is affirmed.

.....

Rouse, J.

WE CONCUR:

.....

Taylor, P. J.

.....

Kane, J.

Appendix "B"

Court of Appeal of the State of California

IN AND FOR THE

First Appellate District

Division Two

F I L E D
SEP 12 1975
Court of Appeal—
First App Dist

By .....
DEPUTY

No. 32967

HARRY JOHNSON,
Plaintiff and Respondent,

v.

SAN FRANCISCO-OAKLAND MAILERS UNION LOCAL No. 18, and
SAN FRANCISCO TYPOGRAPHICAL UNION No. 21.,
Defendants and Appellants.

BY THE COURT:

The petition for rehearing in the above entitled cause is hereby denied.

Dated .....

.....P.J.

Appendix "C"

Clerk's Office, Supreme Court
4250 State Building
SAN FRANCISCO, CALIFORNIA 94102

OCT 9-19....

I have this day filed Order

HEARING DENIED

In re: 1 Civ. No. 32967
Johnson

vs.

S.F.-Oakland Mailers Union

Respectfully,

G. E. BISHEL
Clerk

Supreme Court, U. S.
FILED
FEB 23 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-959

SAN FRANCISCO-OAKLAND MAILERS UNION No. 18 and SAN FRANCISCO TYPOGRAPHICAL UNION LOCAL No. 21,
Petitioners,

vs.

HARRY JOHNSON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
to the Court of Appeal of the State of California
First Appellate District

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-959

SAN FRANCISCO-OAKLAND MAILERS UNION No. 18 and
SAN FRANCISCO TYPOGRAPHICAL UNION LOCAL No. 21,
Petitioners,

vs.

HARRY JOHNSON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
to the Court of Appeal of the State of California
First Appellate District

Harry Johnson, plaintiff below and respondent herein, opposes and objects to petitioners' request for the issuance of a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District to review the decision of August 14, 1975 entered against petitioners, which decision became final on October 12, 1975 upon remittitur by the Supreme Court of the State of California after denial of a Petition for Hearing to that court.

JURISDICTION

Respondent respectfully contends that this court does not have jurisdiction pursuant to 28 U.S.C. §1257(3) in that the title, right, privilege and/or immunities set up or claimed by petitioners herein did not arise under the Constitution, treaties or statutes of the United States. Rather the decision here in issue was rendered solely upon adequate and independent grounds of the laws of the State of California, said laws not being repugnant to the Constitution, treaties or laws of the United States.

STATEMENT OF THE CASE

1. SUMMARY OF THE FACTS.

A. Relationship of the Parties Prior to the Fire Bombing.

This case arises out of a fire bombing on October 26, 1965 occurring in Mill Valley, California. Prior thereto, respondent had acquired ownership interest and publishing rights in a group of weekly newspapers in Marin County collectively referred to as "The Marin Guide" (RT 127, 130).[1] He also acquired an option to buy the plant and equipment located on Caledonia Street in Sausalito, California (RT 133). At the time of respondent's acquisition of the publishing rights, the newspapers were being printed in San Francisco by a subcontractor (RT 129). Respondent planned to reopen the Sausalito plant and

[1]RT references are to the voluminous trial Reporter's Transcript which, due to its size, is not appended. Respondent will immediately file a copy if desired.

reemploy the Local 21 members in the composing room (RT 134, 135, 136). He did not plan to employ any members of Local 18 to do the mailing work because it was obvious from the books of the newspaper that the mailing costs were exorbitant (RT 127). Repondent's plan was to have the mailing done by a union controlled mailing house in San Francisco (RT 137).

Russell Wagle, President of Local 21, suggested that respondent contact Douglas Smith, President of Local 18, to look into the possibility of having the mailing done at the plant by Local 18's members (RT 144). Respondent contacted Smith who agreed to do the mailing in one shift with a crew of six Local 18 members (RT 145). When the Local 18 mailers showed up for work, however, there were not six, but ten to fifteen (RT 147). Respondent had a discussion with Rhodes, the Local 18 foreman, who agreed that fifteen men were too many and that the work could be done with six men plus two supervisors (RT 149). Respondent then observed a Local 18 mailer shove a screwdriver into the mailing machine 30 minutes after the start of operations, thus making the machine inoperable (RT 150). The Local 18 members then left the plant and went to a bar across the street (RT 150).

During the next printing of the newspaper, about one week prior to the fire bombing, eight mailers showed up. The mailing machine "broke down" again, and the Local 18 members again left the plant to go to the bar across the street (RT 154).

Respondent thereafter decided that he would not go through this procedure with the members of Local 18 again (RT 154). He decided to have the mailing done at a union mailing house in San Francisco (RT 154).

At a labor conference in San Mateo on October 25, 1965, the night before the fire bombing, Wagle told Smith that respondent was going to operate the plant without the mailers (RT 331-332). Thereafter, Wagle called and advised his members to leave the Caledonia Street plant and "go out for a cup of coffee" (RT 337). Wagle's purpose for telling his members to leave the job was two-fold: (1) Local 21 did not have a contract with respondent; (2) respondent was getting rid of the mailers (RT 437). A picket line was set up on the night of the 25th in front of the Caledonia Street plant. Members of both Locals 18 and 21 walked the picket line (RT 161, 338, 438).

B. Events on the Picket Line on October 25, 1965.

A picket line was established on the night of October 25, 1965 in front of the Caledonia Street plant and George Hogan, an organizer and elected official of Local 21 was on the picket line (RT 161, 425). The pressmen arrived and advised respondent they would not press the paper (RT 162). Thereafter, respondent made arrangements to have the newspaper printed at a plant in Walnut Creek (RT 477). Prior to the printing, mats made out of a fibered material with a type-produced imprint were prepared at the Caledonia Street plant (RT 164, 165). Respondent at-

tempted to carry the mats through the picket line to his automobile for transportation to the Walnut Creek printing plant. In the process, he was attacked and beaten by members of the picket line (RT 164). Some of the mats were taken from him, torn and destroyed (RT 164, 166, 477, 478).

Smith, Rhodes and Hogan were identified as those who were in the mob that attacked respondent (RT 165). Hogan at the time of the Marin Guide dispute was an officer of Local 21 (RT 425). He was an elected official who would assist the President of the Union in his day-to-day duties (RT 425). He was Wagle's personal representative on the scene of the Marin Guide dispute (RT 425).

Thereafter, new mats were made at the Caledonia Street plant (RT 166). Respondent left through the back of the building with the mats in his hand and went over a fence to meet his wife who had been summoned to meet him in order to transport him and the mats to the printing plant in Walnut Creek (RT 577, 578). He rushed into the waiting automobile followed closely by eight or nine or more men who tried to pry open the door (RT 578). They stomped, hit and rocked the car (RT 578, 586). On the way to Walnut Creek, respondent's car was followed by another car which tried to nudge his car off the road (RT 504).

C. Events of the Night of the Fire Bombing, October 26, 1965.

After having the paper printed in Walnut Creek, respondent brought the newspaper back to a building

he owned in Mill Valley at 200 Shoreline Highway (RT 166). Present at the 200 Shoreline address were approximately 30 to 40 volunteers, 10 to 15 of whom were teenagers who had arrived to assist in getting the paper out (RT 166, 167, 168).

The picketers discovered that mailing work was being done at the 200 Shoreline address and immediately proceeded to set up a picket line at that location (RT 169). The picket line was set up by Smith, Dwane Jones, then Secretary-Treasurer of Local 18, and John DeMartini, Executive Board member for Local 21 (RT 339, 340, 424, 442, 567). Picketers from Local 18 and Local 21 showed up to man the picket line (RT 340). Before the bombing, some 80 people were assembled in front of the Shoreline address (RT 169, 523). Wagle and Hogan recruited members of Local 21 to assist in the picketing on the night of the 26th (RT 441). They wanted a show of strength and protection at the picket site (RT 441). Hogan was present on the night of the 26th at the picket line (RT 279).

On the night of the fire bombing, a truck belonging to respondent was virtually ripped apart; tires were punctured, the distributor cap was pulled off and other wires were pulled out of the truck, and a bomb was placed inside (RT 215, 299).

(1) Smith's Position With Respect to Local 21 and Local 18 on the Night of the Fire Bombing.

On the night of the bombing, Douglas Smith was the President of Local 18 (RT 322). In addition, he

was in charge of all the pickets who were walking the picket line (RT 352, 383). This was true irrespective of whether they were members of Local 18 or Local 21 or any other union (RT 341). While on the picket line, Harris, a member of Local 21 and DeMartini, an officer of Local 21, were under Smith's charge (RT 344, 385). When Smith wasn't there, Bill Rhodes of Local 18 was in charge of the picket line, but when Smith appeared on the scene he supplanted Rhodes in his capacity as Picket Captain (RT 341, 342). Smith's authority as Picket Captain in charge of all picketers on the joint picket line was recognized by Wagle, President of Local 21 (RT 446). When Wagle arrived at the picket line, it appeared to him that Smith was in charge (RT 443). Wagle did not object to Smith being in charge of the picket line (RT 443). Smith had the authority as far as Local 21 was concerned and as far as Wagle was concerned to order members of Local 21 who had been misbehaving off the picket line (RT 445). He also had the authority to go to John DeMartini or George Hogan, officers of Local 21, and instruct them to remove members of their union from the picket line for improper conduct (RT 445, 446). Wagle saw nothing on the night of the 26th while he was at the picket line which led him to believe that he should remain at the scene to exercise authority over his members (RT 460).

Jim Harris, a member of Local 21 and an individual walking the picket line on the night of the 26th, recognized that he was required to ask Smith for permission before he could cross the picket line (RT 516, 531).

(2) Events Surrounding the Bombing Incident.

At or about midnight on the 26th, respondent and six or seven teenagers were in the 200 Shoreline address wrapping newspapers (RT 1676). Respondent saw Smith peeking around a doorway into the room where respondent and the teenagers were working (RT 175). Smith was wearing a wide-brim felt hat and a tweed overcoat (RT 175, 177, 599). A fire bomb came hurtling through the room from the door where Smith had been crouched, striking the wall on the opposite side (RT 180).

The bomb appeared to be a typical grenade beer can with something attached to it (RT 180). It created a fast-burning intense fire in the room with temperatures of over 1200 degrees (RT 106). Respondent could not see the face of the person who threw the bomb, but described the individual as having the same hat and coat as Doug Smith was wearing (RT 179). In a matter of seconds, the entire room was engulfed in flames (RT 180). The occupants of the room exited from the building to an adjacent breezeway (RT 180-181). Respondent escaped from the building. Tom Driskoll hollered, "Mr. Johnson, that's the man who threw the bomb. Grab him" (RT 183). That individual was Smith (RT 184). Driskoll testified at the criminal trial of Smith [which testimony was read into the record at the trial of the within action] that he saw Smith, and the man who was with him, walking out of the room from which the bomb had been thrown to the outside in a "real brisk walk" (RT 603).

Based primarily on this evidence, Smith was tried on January 6, 1966 in the Marin County Municipal Court and found guilty of wilfully and unlawfully entering land belonging to Harry Johnson for the purpose of injuring the property rights of said owner (see Plaintiff's Exhibit 3, RT 92, 368). Smith was sentenced to six months in jail and fined $500 (RT 368).

In spite of this evidence, Smith denied having thrown the bomb (RT 356). He was suspicious that one Warren "Suitcase" Jones, a member of Local 18, had in fact thrown the bomb (RT 352). Just subsequent to the bombing, Smith testified that he saw "Suitcase" Jones exiting the breezeway leading to the area where the bomb was thrown (RT 348, 352); that prior to that time he saw Suitcase on the picket line and he was drunk and disorderly (RT 346); that subsequent to the bombing, Smith overheard Suitcase boasting in the mailroom of the San Francisco Chronicle that he had "cleaned out the rats at the Marin Guide" (RT 350); additionally, that he had received a call from a Mr. Ross, a member of the mailers, advising they had heard in Los Angeles that Suitcase had thrown the bomb (RT 352). At the time of the criminal proceeding Smith "had a very good idea" who had thrown the bomb (RT 361). In spite of this, Smith neither testified at the criminal trial nor advised his defense attorney "that he had a good idea" who had thrown the bomb (RT 361, 362).

Appellants produced "Suitcase" Jones as a witness at the trial. Suitcase testified that he entered the

building and threw the bomb (RT 663). His testimony indicated that he entered through Door No. 5 which is in the rear of the building (RT 662). Herbert Owen, the Tam Valley Fire Chief, arrived at the scene soon after the fire began and found that Door No. 5 was locked (RT 319). Suitcase testified that when he threw the bomb he was by himself (RT 664). Another witness produced by appellants, Henry Holl, a member of Local 18, testified that he was right behind Suitcase when he threw the bomb (RT 802, 804). Suitcase further testified that he had walked a picket line at the Sausalito plant during August and September of 1965 (RT 670). He said that he had walked the picket line on three or four occasions prior to the night of the bombing (RT 670). Clearly, this fire bombing occurred on the second night of picketing; there had been no picketing in August or September of 1965 (RT 741, 742).

Additionally, he testified that he sought and received assurances from the attorneys, representing Local 21, Local 18 and Doug Smith individually that the statute of limitations had run on an arson prosecution in California before he agreed to testify (RT 688).

D. Events Subsequent to the Bombing.

Respondent placed Smith under citizen's arrest on the night of the bombing (RT 186). On the day following the bombing, respondent was told by Hogan, organizer for Local 21, that if respondent did not drop his charges against Smith that he would not

make it alive to the District Attorney's Office to file the formal charges (RT 194, 195).

The picketing continued for over two years subsequent to the bombing (RT 188). Smith was tried in January, 1966 in the Municipal Court of Marin County and was found guilty of wilfully and unlawfully entering land belonging to Harry Johnson for the purpose of injuring the property rights of said owner (RT 92, 352, 368, Plaintiff's Exhibit 3). Smith was convicted and sentenced to six months in jail and fined $500 (RT 368). Smith spent 30 days in jail and then went on the work furlough program for the remaining five months (RT 368). During that time he continued to operate as President of Local 18 (RT 368). Smith's conviction was appealed to the U.S. Supreme Court who refused to overturn it (RT 369). It was general knowledge within the Union that Smith had been convicted and that the U.S. Supreme Court had refused to overturn his conviction (RT 370). Smith testified that he kept no secrets from his Executive Committee, or from the Union (RT 379). Further, he testified that he most likely advised the Union and the Executive Committee of everything that went on at the Marin Guide (RT 379). The minutes of the Executive Committee of the Union of October 30, 1965 reported that both the Executive Committee and the Union concurred in the Union officers' actions at the Marin Guide lockout (RT 380).

In February of 1966, Smith announced to the Union that he had been found guilty in the criminal trial

and that the maximum sentence had been imposed (RT 380, 381). Subsequent thereto, in May of 1966, while Smith was still serving his sentence, he was re-elected as President of Local 18 (RT 381).

Smith continued to frequent the picket line for the two-year period subsequent to the bombing (RT 577, 189, 190). When Smith was on the picket line, he was in charge of all the picketers, including members of Local 21 who were there (RT 383, 385).

There was an administrative procedure whereby a member of Local 18 could bring charges against any other member of Local 18 who had thrown the bomb (RT 370, 371). No charges were ever instituted against Doug Smith (RT 371, 372). Additionally, Smith was never advised by officers of Local No. 21 that he could no longer be in charge of their members when they were on the picket line (RT 387). No action was ever taken by Local No. 21 against Smith to see that he was taken off the picket line subsequent to the bombing (RT 386, 387, 452).

Subsequent to the bombing and prior to the trial in January of 1966, President Wagle of Local 21, along with others, set up the Douglas Smith defense fund (RT 451). Wagle's name was on the letterhead that went out for requests for contributions; as was that of Greg Bachich, the Secretary of Local 21. Wagle personally contributed to the Douglas Smith defense fund (RT 451, 452). At Wagle's request, Smith may have appeared at a meeting of Local 21 to explain his participation in the Marin Guide dispute (RT 454). Local 21 passed a resolution approving the setting up of the Douglas Smith defense fund (RT 467). Smith's $500 fine was paid for out of this fund (RT 389).

E. Threats, Intimidation and Anonymous Telephone Calls.

Threats, intimidation and anonymous telephone calls were perpetrated against the employees of the Marin Guide and against Eleanor Johnson, wife of Harry Johnson, subsequent to the bombing (cites *infra*). Charles Holland, a sergeant in the United States Army and part-time employee of Harry Johnson, was threatened on numerous occasions by Smith (RT 472). In addition Smith threatened to damage Holland's military career if he did not quit the Marin Guide (RT 471). Smith offered to pay Holland what Johnson was paying him if he would not work for the Marin Guide (RT 471).

Jerry Crews, another employee of the Marin Guide, was jumped and beaten by pickets shortly after the labor dispute started (RT 474).

Michael Healy, editor of the newspaper, was physically struck by a picket sign while going across the picket line (RT 533). He was threatened by a picket who had been on the picket line on a consistent basis (RT 533). On more than one occasion he was told "We will bury you", and "Don't worry, Healy, we'll get you, we'll bury you." (RT 533, 534). The individual who had threatened Healy was a member of the picket line and conferred with Bill Rhodes, the member of Local 18 who was in charge of the picket line

when Smith was not there (RT 549). Shortly after the commencement of the strike, Healy received several anonymous phone calls (RT 534).

Eleanor Johnson, wife of Harry Johnson, was threatened in front of Mayer Department Store in Mill Valley, California prior to Christmas of 1967 (RT 570). George Hogan, an officer of Local 21 and three other men whom Mrs. Johnson had seen on the picket line on numerous occasions, stopped Mrs. Johnson and her children on the sidewalk in front of the store (RT 570). Hogan said to her "If you don't tell your husband to drop this lawsuit with Smith, you will find him boxed up" (RT 579). Hogan also looked at Mrs. Johnson's children and said, "Your children are walking now" or "are healthy now" (RT 579, 591).

Approximately eight months after the fire bombing, respondent was attempting to print his paper in a printing plant in San Jose (RT 196, 197). In September of 1966, George Hogan threw an electrical switch controlling a large tubular press at the plant (RT 220). At the time, two of Mr. Johnson's employees, a Mr. Heon and a Mr. Lester, were inside the press (RT 219, 220). Hogan, the Local 21 organizer, told respondent that they would blow up the plant in San Jose if he didn't drop his lawsuit against Doug Smith (RT 197, 218, 219). Picketers were present in front of the San Jose plant on the night of November 2, 1966 when that plant was burned to the extent of $500,000 damage (RT 712, 720).

REASONS FOR DENYING THE PETITION

1. THE UNITED STATES SUPREME COURT DOES NOT HAVE JURISDICTION TO GRANT THE INSTANT PETITION.

The Supreme Court cannot review a state court decision if that decision rests on an adequate state ground. *Murdock v. Memphis,* 20 Wall. 590. Likewise, where the state court has decided both state and federal questions there can be no review if the decision on the federal issue was unnecessary in light of the disposition of the state question. *Foxfilm Corp. v. Muller,* 296 U.S. 207; *Jankovich v. Indiana Toll Road Commission,* 379 U.S. 487.

This Court has often recognized and reaffirmed the right of states to deal effectively with violence and threats thereof which appear in labor disputes and has, consequently, sustained a variety of remedial measures taken by the states as against numerous contentions that local law had been preempted by federal labor legislation, *United Mine Workers v. Gibbs,* 283 U.S. 715; *Allen-Bradley v. Wisconsin Bd.,* 315 U.S. 740. The California courts have applied local substantive and evidentiary law to remedy conduct neither sanctioned, protected nor preempted by federal legislation. The Court below did not interpret nor presume to apply federal law, rather it clearly applied the statutory and common law of this state to the facts presented and rendered its judgment accordingly.

In so doing the California Court of Appeal held the evidence "clear" that Local 18 and its members were aware at all times that a fire bomb had been

thrown into respondent's building and also knew such act was wrongful and unlawful. The court found that knowing defendant Smith was charged with the offense and was being criminally prosecuted, petitioners attempted to avoid the effect of this evidence by asserting their belief that one "Suitcase" Jones had really thrown the incendiary device. The court found it clear that Local 18 had voted to concur in Smith's actions, elected to retain him as president, left him in full command of petitioners' picket lines and contribute to his defense fund. "In face of this evidence, it is difficult to see how any reasonable jury could have come to any other conclusion but to that Local 18 had ratified Smith's of throwing the incendiary bomb . . . the independent evidence of ratification by Local 18 was overwhelming" (Petitioners' Appendix A, page 13).

Viewing similar facts, the court also found "the record [to be] replete with evidence that Local 21 had authorized Smith to act as its own agent . . . [and] that plaintiff's refusal to employ members of Local 18 constituted the primary, if not the sole motivation for the participation of both unions in the formation of the picket line" (Petitioners' Appendix A, page 14). The court found Wagle and Hogan of Local 21 "both recruited members of Local 21 to participate in the picketing and they themselves participated" (Petitioners' Appendix A at page 15). The court clearly found "the evidence furnishes more ample support for finding that Smith was, at all relevant times, acting as the agent of both unions who

were jointly attempting to induce plaintiff to reemploy members of Local 18" (Petitioners' Appendix A at page 16). The California Court held "the evidence . . . failed to disclose any indication of an attempt by Local 21 to disassociate itself from Smith following the bomb-throwing incident. On the other hand, the evidence does contain ample indication of Local 21's unqualified approval of his conduct" (Petitioners' Appendix A at page 17).

These findings of fact are binding upon the federal court. The Court of Appeal's holding that "the evidence furnishes more ample support for finding that Smith was, at all relevant times, acting as the agent of both unions who were jointly attempting to induce plaintiff to reemploy members of Local 18" (Petitioners' Appendix A at page 16), must stand because the United States Supreme Court will accept as binding upon it the state court's decision of questions of state law. *Murdock v. Memphis,* 20 Wall. 590. Petitioners themselves argued before the Court of Appeal that the allegedly applicable federal legislation "incorporated guidelines identical to those adopted by California to determine the propriety of imposing punitive damages on a principal . . ." (Petitioners' Brief to the Court of Appeal of the State of California, First Appellate District, page 35).

2. FEDERAL LABOR LEGISLATION, PARTICULARLY SECTION 6 OF THE NORRIS-LaGUARDIA ACT (29 U.S.C. §106) DOES NOT PREEMPT STATE LAW.

By its very terms, Section 6 of the Norris-LaGuardia Act (29 U.S.C. §106), found at Chapter 6, Title 29, referring to jurisdiction of courts, states a rule of law applicable "in any court of the United States." As used in Chapter 6, the term "Court of the United States" is explicitly limited to those courts "whose jurisdiction has been or may be conferred or denied or limited by an act of Congress, including the courts of the District of Columbia" [29 U.S.C. §113(d)]. Since the Superior Courts of California may not be so defined, Section 6 is clearly not binding upon them.

The crucial issue is "whether the application of state law in this kind of case will operate to frustrate the purpose of the federal legislation." *Colorado Anti-Discrimination Commission v. Continental Airlines,* 327 U.S. 714, 722; *Teamsters Local 20 v. Morton,* 377 U.S. 352. Imposition of state law remedies herein does not frustrate the purpose of the federal legislation. First the public policy, as announced at Section 2 of the Norris-LaGuardia Act (29 U.S.C. §102), is to allow labor an atmosphere of freedom to organize and collectively bargain to obtain acceptable terms and conditions of employment. This policy is neither frustrated nor circumvented by the state's legitimate exercise of its inherent police power to assure tranquility and to maintain the public order and safety. Rather the Supreme Court has:

> . . . Allowed the states to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order . . . [citation omitted] . . . [S]tate jurisdiction has prevailed in those situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overriden in the absence of clearly expressed congressional direction . . . In the present case there is no such compelling state interest. *San Diego Building Trades v. Garmen,* 359 U.S. 236, 247-48.

Secondly, in deciding whether 29 U.S.C. §106 preempts California common law, this court has noted that Section 6 was intended to abrogate the doctrine of criminal conspiracy and its harsh imposition of criminal sanctions on the basis of vicarious or imputed liability. *United Brotherhood of Carpenters v. U.S.,* 330 U.S. 398, 404. It was the policy of Section 6 that "as a rule of evidence, clear proof should be required, so that criminal guilt and criminal responsibility should not be imputed but proven beyond a reasonable doubt in order to impose liability" 330 U.S. at 406. Again, this purpose is not frustrated by the local court's application of its common law rules of agency.

Thirdly, this court has constantly upheld the right of states to apply their own common law rules of torts to impose local remedies to deal effectively with labor violence and threats thereof; this "to the protection of the compelling state interest in the maintenance of domestic peace" *United Mine Workers v. Gibbs,* 383 U.S. 715, 730; *Allen-Bradley v. Wisconsin Bd.,* 315 U.S. 740; *Youngdahl v. Rainfair, Inc.,* 355

U.S. 131; *U.M.W. v. Russell,* 356 U.S. 634. States have the power to entertain common law tort actions for damages even though the conduct upon which the suits are predicated constitutes an unfair labor practice under the Labor Management Relations Act (29 U.S.C. §141, *et seq.), United Construction Workers v. Laburnum Constr., Inc.,* 347 U.S. 656. The states have jurisdiction to award damages to one prevented from entering his place of employment by mass picketing or threats of violence engaged in by members of the striking union *U.M.W. v. Russell,* 356 U.S. 634. Likewise, federal legislation does not deprive states of the power to enjoin mass picketing or picketing involving violence, notwithstanding interstate commerce would be effected thereby *Allen-Bradley Local v. Wisconsin Bd.,* 315 U.S. 740; *U.M.W. v. Russell, supra.* The basic premise lies in respect for our Federal system and upon recognition of the compelling state interest in maintaining domestic peace. Petitioners' assertion that federal law preempts imposition of state remedies is, therefore, insubstantial. It has been explicitly foreclosed. Consequently, review by this court should not be granted. *Street v. New York,* 394 U.S. 576, 581; Rule 19 of the Rules of the Supreme Court of the United States. Finally, the jurisdiction of the California court is guaranteed by 29 U.S.C. §187(b) and it is impowered to enforce the criminal penalties and common law penalties as they arise in labor violence. *United Construction Workers v. Laburnum Constr. Co.,* 347 U.S. 656, 666.

3. THE NORRIS-LaGUARDIA ACT WOULD NOT AFFECT THE DECISION BELOW.

In situations were the Norris-LaGuardia was involved the United States Supreme Court has allowed the states to grant compensation for the consequences of labor disputes once such is marked by violence and/or imminent threats to the public order, as defined by the state's traditional common law, *U.M.W. v. Russell,* 356 U.S. 634; *San Diego Bldg. Trade Council v. Garmen,* 359 U.S. 236; *United Constr. Workers v. Laburnum,* 347 U.S. 656; *Teamsters Local 20 v. Morton,* 377 U.S. 252. This court has constantly upheld the right of state courts to apply their own common law rules of torts and to impose their own remedies in order to effectively deal with labor violence and threats thereof; this "to the protection of the compelling state interest and the maintenance of domestic peace", *U.M.W. v. Gibbs,* 383 U.S. 715; *Allen-Bradley v. Wisconsin Bd.,* 315 U.S. 740; *Youngdahl v. Rainfair, Inc.,* 355 U.S. 131; *U.M.W. v. Russell,* 356 U.S. 634. Most recently it was held:

> "This court has constantly recognized the right of states to deal with violence and threats of violence appearing in labor disputes, sustaining they have a variety of remedial measures against the contention that state law was preempted by the passage of federal labor legislation" *U.M.W. v. Gibbs,* 383 U.S. at 715.

In *Gibbs* this court restricted the remedies available to those damages directly and proximately caused by the wrongful conduct chargeable to the defendant

as defined by the traditional law of torts, 383 U.S. at 731.

In the instant case, the trial court, the Court of Appeal (on two occasions), and the California Supreme Court found that on applying California common law ". . . Local 18 had ratified Smith's act of throwing the incendiary bomb . . . [and that] . . . the independent evidence of ratification by Local 18 was overwhelming" (Petitioners' Appendix A, at page 13). Similarly, the court held "the evidence furnishes more than ample support for finding that Smith was, at all relevant times, acting as the agent of both unions who were jointly attempting to induce plaintiff to reemploy members of Local 18" (Petitioners' Appendix A at page 16). The California Court concluded that "there was ample evidentiary support for findings that Smith was acting in the scope of his authority as an agent of both unions when he threw the bomb and that both unions . . . subsequently ratified this conduct on his part . . ." (Petitioners' Appendix A at page 17).

Respondent respectfully asserts that "clear proof" of petitioners' authorization, participation and ratification of the wrongful conduct of Smith exists and is sufficient to make the award of compensatory and punitive damages proper both under California law, which is not reviewable herein, and under the Norris-LaGuardia Act.

4. THE EVIDENCE ADMITTED TO PROVE PETITIONERS' ACTS OF RATIFICATION DID NOT INVADE THEIR RIGHTS NOR THOSE OF THEIR MEMBERS.

The restraints imposed by the First and Fourteenth Amendments of the United States Constitution limit State and Federal Governmental action respectively and are not restrictive of private activities. *Moose Lodge v. Irvis,* 407 U.S. 163; *Central Hardware Co. v. National Labor Relations Bd.,* 407 U.S. 539. Mere enforcement of a private right of action in a competent state court is not "state action" for purposes of either amendment. *Evans v. Abney,* 396 U.S. 435; *Moose Lodge v. Irvis,* 407 U.S. 163; *Central Hardware Co. v. N.L.R.B.* Rather the court must sift through and weigh the facts to make an independent determination of whether states action exists. *Gilmore v. Montgomery,* 417 U.S. 556. Respondent's enforcement of his common law rights in a state court of general jurisdiction is not, therefore, barred by either the First or Fourteenth Amendment. Moreover, petioners do not have standing to assert the Constitutional rights of their members *Tileston v. Ullman,* 318 U.S. 44; *Flast v. Cohen,* 392 U.S. 83; *Sierra Club v. Morton,* 405 U.S. 727. The exceptions to the general rule are not here applicable. *Griswald v. Connecticut,* 381 U.S. 497; *Sierra Club v. Morton, supra.*

Rights of assembly, association and free speech are not absolute and may not be used to further an evil which the state has a legitimate interest to control, *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508. Conduct is not protected under the First Amendment when intended to ratify further

acts of intimidation and violence, *Hass v. Indiana,* 414 U.S. 105. In the instant case, the conduct of petitioners is not protected under First or Fourteenth Amendment because it was violent and/or intended to ratify violent activities. Therefore, the facts relied upon by the courts below to find and affirm common law liability are probative, clear and convincing, and not violative of the rights asserted.

CONCLUSION

For the foregoing reasons respondent respectfully prays this court deny the subject Petition for Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District.

Dated, San Francisco, California,
February 20, 1976.

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